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IN THE

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1990

AL GOMEZ, WARDEN OF THE DEUEL VOCATIONAL INSTITUTION OF THE STATE OF CALIFORNIA,

Petitioner,

v.

MICHAEL SHERIDAN MCKINNEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state habeas petitioner exhausts his state remedies as to a certain claim where:

a) in the state's highest court, petitioner files a state habeas petition that solely alleges ineffective assistance of appellate counsel in failing to timely pursue the certain claim, and

b) subsequently in federal court, petitioner files a petition for writ of habeas corpus that directly raises the certain claim.

2. Whether a federal court can, by utililzing any standard other than the whole trial was rendered "inconsistent with the rudimentary requirements of justice", find federal due process error

based solely on the admission of evidence at the state trial[13/]

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13. This issue has also been presented in another petition for certiorari from the Ninth Circuit that is presently pending in this Court in Estelle v. Mark McGuire (USCA 9th Cir. No. 87-2522), filed December 17, 1990, in USSC 90-1074.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, filed on September 5, 1990, in No. 89-55869, a memorandum decision, is attached hereto as Appendix A.

On November 30, 1990, the Court of Appeals issued an order denying the petition for rehearing and rejecting the suggestion for rehearing *en banc* which is attached hereto as Appendix B.

On February 19, 1988, a United States Magistrate issued an "Order" holding that respondent had exhausted his state remedies and ordering petitioner to file a return on the merits to the petition for writ of habeas corpus which is attached hereto as Appendix C.

On June 19, 1989, a United States Magistrate-Judge issued a "Report and Recommendation of United States Magistrate on a Petition for Writ of Habeas Corpus by a Person in State Custody." On July 27, 1989, the United States District Court for the Central District of California issued an "Order Adopting Findings, Conclusions, and Recommendations of United States Magistrate." On July 31, 1989, a "Judgment", which granted the writ of habeas corpus, was issued in favor of respondent. These orders are attached hereto collectively as Appendix D.

On September 24, 1986, the California Supreme Court issued an order denying respondent's petition for writ of habeas corpus which is attached hereto as Appendix E.

On July 24, 1986, the California District Court of Appeal for the Second Appellate District, Division One, issued an opinion affirming the conviction which is attached as Appendix F.

JURISDICTION

The date of the judgment which petitioner seeks to have reviewed is September 5, 1990.

A petition for rehearing was denied on November 30, 1990. A suggestion for rehearing *en banc* was also rejected on November 30, 1990.

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254(a):

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

On December 19, 1984, respondent, who brutally slit his mother's throat, was convicted by jury in a state court in California of murder in the first degree, a violation of California Penal Code

section 187. The state jury also found true a special allegation that in the commission of the offense, respondent had personally used a knife, which use was not necessarily an element of the offense, within the meaning of California Penal Code section 12022(b). Respondent was sentenced to state prison for the term prescribed by law, 25 years to life, for the offense of murder and was sentenced to serve one year for the special knife use allegation found true. Clerk's Transcript, p. 158[2]/.

Respondent appealed his conviction to the California Court of Appeal, contending, *inter alia*, that the trial court had allowed overly prejudicial

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2. Copies of the Clerk's Transcripts and the Reporter's Transcripts of the trial were lodged below as Docket Number 10 and are hereinafter referred to, respectively, as "CT" and "RT."

evidence, to wit, prior ownership of, and fascination with, knives. On July 24, 1986, respondent's conviction was affirmed by the California Court of Appeal, Second Appellate District, in an unpublished decision. Appendix F.

Respondent attempted to obtain direct review of the decision of the California Court of Appeal by filing, in the California Supreme Court, an untimely Petition for Review which was rejected for filing. Respondent then filed a Petition for Writ of Habeas Corpus in the California Supreme Court which alleged solely he had been denied effective assistance of appellate counsel because appellate counsel had been derelict in failing to timely file the Petition for Review. Docket No. 10. This petition was denied without comment or citation to authority. Appendix E.

Respondent then filed the instant petition for writ of habeas corpus in the United States District Court for the Central District of California in which he alleged, *inter alia*, that his due process rights had been violated based on his allegation that overly prejudicial evidence, to wit, knife ownership and fascination, had been admitted at his state trial. The petition did not include any claim of ineffective assistance of counsel. Docket No. 1.

Petitioner filed a return to the Petition for Writ of Habeas Corpus which contended that respondent had failed to exhaust his state remedies as to all of the issues asserted in the petition. Docket No. 4. A United States Magistrate-Judge rejected the claim of lack of exhaustion and ordered petitioner to file a return to the petition on the

merits. The magistrate-judge held that the petition for writ of habeas corpus filed by respondent in the California Supreme Court had sufficiently exhausted the issues raised in the petition by virtue of the fact that it attached the untimely, unfiled Petition for Review as an exhibit to support the claim of ineffective assistance of counsel, even though the main body of the petition never advanced the claims contained in the exhibit as an independent basis for relief. Appendix C.

Petitioner then filed a return on the merits. Docket No. 9. The United States Magistrate-Judge subsequently issued a "Report and Recommendation of United States Magistrate on a Petition for Writ of Habeas Corpus by a Person in State Custody" which found that the prejudicial character of the knife ownership and

fascination evidence outweighed its probative value and that the "error" in the admission of the evidence had a likely effect on the outcome of the trial and, thus, respondent's due process rights were violated and that the writ should be granted. Appendix D.

Petitioner then filed "Objections to Report and Recommendation of United States Magistrate" on the ground that the magistrate-judge had utilized the incorrect standard in reaching his conclusion on the evidentiary question. Docket No. 25. On July 27, 1989, the United States District Court for the Central District of California issued an "Order Adopting Findings, Conclusions, and Recommendations of United States Magistrate." Judgment granting the writ of habeas corpus was issued in favor of respondent on July 31, 1989. Appendix D.

On August 10, 1989, petitioner filed a "Notice of Appeal" of the judgment of the United States District Court. Docket No. 30. On November 20, 1989, petitioner filed an appellant's brief in the Court of Appeals for the Ninth Circuit which contended that respondent had failed to exhaust his state remedies and that the district court had additionally erred in granting the writ of habeas corpus on the ground of the admission of the knife evidence at the state court trial.

On September 5, 1990, the United States Court of Appeals for the Ninth Circuit, in No. 89-55869, issued a memorandum decision affirming the judgment of the United States District Court and found 1) respondent had sufficiently exhausted his state remedies by attaching the unfiled Petition for Review (which had briefed all of the issues later raised in

the federal habeas petition, including the evidentiary issue) as an exhibit to his state habeas petition which was filed on the sole ground of ineffective assistance of counsel and thereby provided the state's highest court a "fair opportunity" to consider the claims referred to in the exhibit, and 2) there was an "erroneous" admission of "character" evidence which the Court could not hold "harmless beyond a reasonable doubt", and therefore, respondent's trial was found to be fundamentally unfair in violation of his constitutional right to due process. See Appendix A.

On September 11, 1990, petitioner filed a petition for rehearing and suggestion for rehearing *en banc*. Petitioner argued that respondent had not presented the evidentiary admission question to the state's highest court.

Petitioner further argued that the Court had failed to consider certain state court findings of fact and that the case was distinguishable from McGuire v. Estelle (9th Cir. 1990) 902 F.2d 749, 753-754, cited in the memorandum decision for support. The petition for rehearing and suggestion for rehearing *en banc* was denied on November 30, 1990.

STATEMENT OF CASE

On January 28, 1984, at 11:30 p.m., respondent's adoptive mother was found dying at home from four cuts to her body, one slash to the throat and three chest wounds. The state court jury rendered a special finding of fact that respondent had personally used a knife in the commission of murder and enhanced respondent's sentence by reason thereof. C.T. 158.

Respondent testified that, on the

night of the murder, he had left the house for the movies earlier in the night and had come home at 11:00 p.m., dozed off, and found his adoptive father holding his mother at 11:30 p.m. Respondent's adoptive father, Quentin McKinney, a long distance trucker had just returned from a trip on the night of the murder, and he testified that after an argument between respondent and his wife, he had gone to sleep at 8:30 p.m. and had awoke at 11:30 p.m. to find his wife dying of the wounds. R.T. 83.

A pair of ski gloves, which respondent denied were his but which one of his female associates from Canada stated were similar to gloves she had seen him wear, were found to bear the victim's blood. R.T. 903. In addition, a pair of camouflaged pants belonging to respondent were soaked with the victim's blood. R.T.

217-218. The tee-shirt worn by Quentin McKinney when he held his wife also contained the victim's blood. However, a Buck knife Mr. Quentin McKinney was wearing was taken by the police, examined, and found to contain no blood whatsoever, despite the fact that he had been holding his bleeding wife and wearing the knife for a considerable amount of time3/. R.T. 192-193, 347, 349.

The residence was a secured dwelling and there were no signs of forced entry. R.T. 190. The argument between respondent and the victim concerned respondent's attempt to borrow $3,000 from the father to continue school and the victim's

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3. The decision of the Court of Appeals for the Ninth Circuit suggests that Quentin McKinney, though lacking any motive, was just as likely to have been the murderer as respondent. Although Quentin McKinney was arrested immediately after the crime, he was released after the

opposition to that request. The father stated that he would go to sleep and decide whether to make the loan after he awoke. R.T. 64-67.

The murder weapon was never recovered, but the Coroner testified that two weapons presented to him for display could have inflicted all four wounds. R.T. 496, 497. One first weapon presented to the Coroner, which was purchased by the prosecution, was a replica of a Gerber dagger once owned by petitioner and taken from him by the police. The defense asked the coroner if this weapon could have also inflicted the wound following the coroner's testimony that the second weapon could have

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3. (Cont.) examination of his buck knife showed no blood; the point being if he had committed the assault and had washed clean the knife, it would have been self-defeating to strap it back on and

inflicted the wounds. The second weapon was a Tekna dagger that was surrendered to the prosecutor by respondent's best friend, Constantine Potamianos, after the murder. Potamianos told the prosecutor, however, that respondent had made a gift to him of the dagger three months prior to the murder. R.T. 414, 416.

To rebut the testimony of Potamianos, the prosecutor solicited the testimony of respondent's dormitory roommate at Loyola University of Los Angeles, Christopher Roderick. Roderick testified that respondent had used a knife that looked exactly like the surrendered Tekna dagger to scratch the words "Death is His" into their dormitory door well after the date Potamianos claimed that

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3. (Cont.) have further contact with the bleeding victim.

respondent had given him the weapon. R.T. 447-448.

The prosecutor also attempted to show that it was a suspicious circumstance that respondent, a knife enthusiast, had conveniently abandoned his knife collection and was not in possession of any knives at the time of the murder. To this end, the prosecutor solicited testimony of respondent's associates as to respondent's love for knives and that he considered his collection of them to be "very valuable." R.T. 522. He also elicited testimony that on some occasions, respondent would strap a dagger to his leg when he was wearing the camouflaged pants that were found soaked in the victim's blood. R.T. 441.

Moreover, the prosecutor attempted to cast doubt on respondent's claim that he owned no knives at the time of the

murder by asking respondent how much he liked knives, whether he was fascinated by them and whether he liked owning them. The prosecutor also called a female associate of respondent to the stand to testify that respondent had a habit of talking about knives. R.T. 522.

Lastly, the prosecutor elicited testimony that respondent dressed up in commando garb to view the movie "Apocalypse Now", a film wherein the hero is a commando. Testimony was also presented that during a power outage at the university, respondent strapped on a knife, disappeared into the darkness and was not seen again until the next morning. R.T. 458. The throat wound to the victim was from side to side. R.T. 474.

REASONS FOR ALLOWANCE OF THE WRIT

Petitioner urges that a writ of certiorari should be granted for the

following special and important reasons:

A. The decision of the Court of Appeals for the Ninth Circuit "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision" (United States Supreme Court Rules, Rule 10.1.(a)) in that:

> 1. The expansion of the concept of exhaustion of state remedies implicit in the appellate decision conflicts with <u>two</u> separate settled lines of decisions of this Court that a) a state habeas petitioner does not exhaust his state remedies if he either changes the factual bases or theories upon which

he seeks relief to the point that the claim that he raised in the state's highest court is not the same as that upon which he seeks relief in the federal courts (Anderson v. Harless, 459 U.S. 4, 6-7, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982); Eaton v. Holbrook, 671 F.2d 670, 671 (1st Cir. 1982); Turner v. Fair, 617 F.2d 7, 11 (1st Cir. 1980)), and b) that a claim of ineffective assistance of counsel is not synonymous with making a claim on the merits of the issues upon which the claim of ineffective assistance of counsel is based, as per Kimmelman v. Morrison, 477 U.S. 365 [106 S.Ct. 2574; 91

L.Ed.2d 305] (1986).

2. The decision effectively creates a "Federal Habeas Evidence Code" by finding that the evidence in question was "erroneously" admitted, and thus unduly expands the scope of federal habeas corpus review of the admission of evidence at state court trials from showing a due process violation by virtue of the fact that the admission of the evidence converted <u>whole</u> the trial into one that was "inconsistent with the rudimentary requirements of justice" to merely showing that the evidence was "erroneously" admitted under either state or

federal statutory law and that the admission then had an effect on the outcome of the trial.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals for the Ninth Circuit erred in holding that respondent exhausted his state remedies. Respondent never presented, to the California Supreme Court, the claim upon which he was ultimately granted relief but instead presented an entirely different claim. In the state's highest court, respondent alleged solely that his appellate counsel was ineffective in failing to preserve his further right of appeal as to certain claims. On federal habeas review, however, respondent directly presented the claims which he had alleged his appellate counsel had failed to preserve.

A state prisoner does not exhaust state remedies if he changes either the factual or legal thrust of his argument such that the claim being made on federal

habeas review is not the same as that which was presented to the state's highest court. Anderson v. Harless, supra. Moreover, a state prisoner on federal habeas review does not exhaust the claims which form the basis of an allegation of ineffective assistance of counsel by urging solely, as a basis of relief, ineffective assistance of counsel. Kimmelman v. Morrison, supra.

The decision of the Court of Appeals for the Ninth Circuit also erred in promulgating a new test for finding federal due process error by reason of the admission of evidence in state court proceedings. The decision, although lacking any legal authority, implicitly finds that the admission of "character" evidence in state court trials is "error" per se. The decision then finds such "error" to be prejudicial unless "harmless

beyond a reasonable doubt."

Contrary to the decision, this Court has held that the federal courts cannot proscribe or regulate state rules for the admission of evidence. Spencer v. Texas (1966) 385 U.S. 554. Further, in that decision, this Court specifically stated that the federal courts have no authority to proscribe the admission of evidence of prior bad conduct behavior. Ibid.

Lastly, in order to find federal due process error by reason of the admission of evidence in a state court trial, a federal court reviewing on habeas must find that the admission of the evidence rendered the entire trial to be fundamentally defective, which can only mean that which is inconsistent with the rudimentary requirements of justice and fair play, a farce and a mockery. Cassasa v. Nelson, 452 F.2d 1083, 1084-1085, (9th

Cir. 1971). As such, the Court of Appeals for the Ninth Circuit has promulgated a new method of analyzing, on federal habeas review, the admission of evidence at a state court trial that fundamentally conflicts with settled law, as announced by this Court.

ARGUMENT

I

THE OPINION OF THE NINTH CIRCUIT UNDULY EXPANDS THE CONCEPT OF EXHAUSTION OF STATE REMEDIES BY ALLOWING EXHAUSTION WHERE CLAIMS HAVE BEEN MERELY "MENTIONED" AND NOT ADJUDICATED BEFORE THE STATE'S HIGHEST COURT

The Court of Appeals for the Ninth Circuit affirmed the granting of federal habeas corpus relief despite the fact that the respondent never presented, to the state's highest court, the claim upon which relief was ultimately granted.

Respondent had obtained review of his contention in a state intermediate court which had denied his claim. He unsuccessfully sought direct review of the claim, and others, by attempting to file a Petition for Review in the California Supreme Court. However, his Petition for Review was rejected as untimely.

Respondent then sought to overcome

the procedural default by filing a state Petition for Writ of Habeas Corpus alleging solely ineffective assistance of counsel, in that appellate counsel negligently failed to timely file the Petition for Review. The state habeas petition solely raised the issue of ineffective assistance of counsel and attached, as an exhibit, the unfiled Petition for Review which contained the issue, *inter alia*, upon which the federal habeas writ was ultimately granted. The state habeas petition made "reference" to the exhibit in order to show that the issues contained therein were "potentially meritorious" and thus to demonstrate that respondent had been "prejudiced" by his appellate counsel's error.

The Court of Appeals for the Ninth Circuit ruled, in conflict with existing law, that by attaching the unfiled

Petition for Review as an exhibit to his state habeas petition, respondent provided the state's highest court with a "fair opportunity" to consider the claims raised in the exhibit despite the fact that respondent did not request that the California Supreme Court adjudicate those claims. This decision vitiates the requirement, settled by this Court in Picard v. Connor, 404 U.S. 270, 276 [92 S.Ct. 509; 30 L.Ed.2d 438] (1971), that the state courts be provided a "fair opportunity" to dispose of a federal claim, and also conflicts with settled law of this Court that a state prisoner must present the same factual-legal contentions to the federal courts that he raised in the state court. Anderson v. Harless, supra, 459 U.S. at 6-7.

In addition, the decision of the Court of Appeals for the Ninth Circuit

conflicts with settled decisions of this Court which hold that a plea of ineffective assistance of counsel does not raise the merits of the underlying claim upon which the plea of ineffective assistance of counsel is based. Kimmelman v. Morrison, supra.

First, the state's highest court had no "opportunity" at all, let alone a "fair" one, to consider the claims contained in the exhibit attached to the state habeas petition, including the one upon which the writ was granted. The only issue raised in the pleading relied on by the Court of Appeals for the Ninth Circuit to satisfy the exhaustion requirement was a claim of ineffective assistance of counsel. Thus, the only disposition of the state habeas petition
that the California Supreme Court could have made was on the question of whether

respondent's appellate counsel was ineffective. As is almost universally true with courts of general jurisdiction, the California Supreme Court, under settled rulings, will not decide issues that are not before them4/. (See, e.g., Lacoe, et al. v. Wolf, et al., 218 Cal. 167, 172 [21 P.2d 555] (1933).)

In the instant case, the Court of Appeals for the Ninth Circuit rested its exhaustion ruling on Kim v. Villalobos, 799 F.2d 1317, 1320 (9th Cir. 1986).

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4. In fact, the claim of ineffective assistance of counsel could have been disposed of by the California Supreme Court by its sole consideration of whether the challenged actions of the attorney fell below the standards required by California law. See People v. Pope, 23 Cal.3d at 412, 425 [590 P.2d 859; 152 Cal.Rptr. 732] (1979). Such a disposition would not have involved any of the merits of the issues sought to be adjudicated in the untimely petition for review that was attached as an exhibit to the state habeas

Here the issue is not lack of clarity as in Kim where the Ninth Circuit implied that the California Supreme Court had a "fair opportunity" to view the exhibit to enable it to understand the main petition. However, the sole grievance that the California Supreme Court had with the state habeas petition in Kim was lack of particularity or, in other words, vagueness; not, as petitioner contends here, that the claim was different. Here,

In this case, contrary to Kim, the issues contained in the exhibit were not the same as those contained in the petition to which it was attached; which is precisely the point of petitioner's grievance. The issue here is whether it can be said that the California Supreme

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4. (Cont.) petition, including those in the claim of evidentiary error upon which federal habeas relief was ultimately granted.

Court had a "fair opportunity" to dispose of the claims made in the exhibit on their merits when those claims were not advanced as a basis for relief to that Court and were not the same as the issue that was advanced as a basis for relief in the state habeas petition.

More importantly, the foregoing demonstrates that respondent has not exhausted the claim upon which he was granted habeas corpus relief. A state prisoner has not exhausted his state remedies if he has failed to present the same claim, both factually and legally, that he presented to the state courts. Anderson v. Harless, supra, 459 U.S. at 6-7; Allbee v. Cupp, 716 F.2d 635, 636-37 (9th Cir. 1983). Respondent has simply presented, to the federal courts, a different issue, evidentiary error, than he raised in the California Supreme Court,

which was ineffective assistance of counsel. A state prisoner cannot switch his theory when he files his federal habeas petition so that it is not substantively the same as he urged in the state courts.

A realization of the latter point segues into the second conflict the exhaustion ruling has with existing law- i.e., that it assumes that a plea of ineffective assistance of counsel is synonymous with addressing a claim regarding the merits of the issues underlying the claim of ineffective assistance of counsel. To the contrary, this Court has consistently held the contrary to be true. It is settled federal law that, raising, in state court, a complaint of ineffective assistance of counsel based on counsel's alleged failure to present a potentially meritorious claim

is not synonymous with raising the underlying claim itself and is distinct therefrom. See Kimmelman v. Morrison, 477 U.S. 365, 374-375, [106 S.Ct. 2574, 91 L.Ed.2d 305] (1986).

The decision of the Court of Appeals for the Ninth Circuit thus eliminates that distinction on the question of exhaustion. Since the issue of exhaustion impacts the sensitive area of federal-state comity (Castille v. Peoples, 489 U.S. 346, ____ [109 S.Ct. 1056 at 1059; 103 L.Ed.2d 380] (1989)), the distinction should be maintained and not blurred.

In conclusion, the decision of the Court of Appeals for the Ninth Circuit sanctions the lower court's vitiation of the exhaustion doctrine. The departure sanctioned would, in cases where the defendants could demonstrate that a claim received the "slightest mention" in a

state court pleading even though not urged as an independent basis for relief, excuse state defendants from the requirement that they first obtain a ruling on the claim from the highest state court.

This Court's supervisory power should be exercised to prevent the proliferation of this practice. This practice could severely impact on all litigation, including capital litigation, because for various reasons, it is a common practice to attach a complete lower court pleading to a filing in a higher court. For this reason, the writ of certiorari should be granted to review this important question of law.

II

THE OPINION OF THE NINTH CIRCUIT FINDS "ERROR" IN THE ADMISSION OF EVIDENCE AT THE STATE COURT TRIAL AND AND ASSESSES ITS EFFECT ON THE OUTCOME OF THE STATE COURT TRIAL WHEREAS, TO THE CONTRARY, THIS THIS COURT HAS CONSISTENTLY HELD THAT, ON HABEAS REVIEW, THE SOLE QUESTION TO BE DETERMINED IS WHETHER THE ADMISSION OF THE EVIDENCE RENDERED THE TRIAL AS A WHOLE TO BE A "INCONSISTENT WITH THE RUDIMENTARY REQUIREMENTS OF JUSTICE"

The opinion of the Court of Appeals for the Ninth Circuit not only errs in disposing of the exhaustion issue but fundamentally conflicts with the law of this Court with respect to review of a claim of a due process violation by reason of the admission of evidence in a state court trial.

The decision of the Court of Appeals for the Ninth Circuit, citing California statutory law, begins by stating, "Pursuant to California law, evidence of a criminal defendant's prior conduct is

inadmissible if its sole purpose is to show his disposition or propensity to commit the offense charged. Cal. Evid. Code § 1101." See Appendix A, p. 73; emphasis added.

The decision then notes the similarity between this state statute and Rule 404 of the Federal Rules of Evidence. See Appendix A, pp. 73-74. The purpose of these notations and the discussion which follows immediately thereafter is to show that what had occurred at respondent's trial was what the decision later labels an "erroneous admission of character evidence." See Appendix A, p. 76.

However, federal courts reviewing state convictions on habeas review do not adjudicate the propriety of state court rulings on pure questions of state law. See Cady v. Dombrowski, 413 U.S. 433, 449 [93 S.Ct. 2523; 37 L.Ed.2d 706] (1973).

As such, the Court of Appeals could not have reached the conclusion that it was "error" to admit the evidence on the ground that its admission was improper under California law. If that were the case, then the issue would have to be deemed conclusively decided in this case by the state appellate court decision. See Douglas v. Jeanette, 319 U.S. 157, 162 [63 S.Ct. 877; 87 L.Ed.2d 1324] (1943).

Moreover, federal courts reviewing state convictions on habeas review cannot apply federal statutory or evidentiary law in disposing of the petition because what is being reviewed is a state, not a federal decision. See e.g., Cherek v. United States, 767 F.2d 335, 337 (7th Cir. 1985). Accordingly, the decision of the Court of Appeals for the Ninth Circuit, if it did so, erroneously relied on Federal Rules of Evidence, Rule 404, which it

cited, to reach its conclusion that the admission of the evidence constituted "error."

Moreover, there is no legal support for the proposition that the introduction of "character evidence" in a state trial is federal "constitutional error." In fact, this Court has held to the contrary in Spencer v. Texas (1966) 385 U.S. 554. Spencer makes clear that the Federal Constitution is not "infringed if a jury is told of a defendant's prior crimes." (Id. at p. 560.)

Thus, this Court has explicitly rejected the notion that the introduction of evidence at a state court trial, including "character evidence", even in the form of evidence of prior criminal convictions, constitutes federal "constitutional error" *per se*. This being true, the decision of the Court of Appeals

for the Ninth Circuit effectively creates a "Federal Habeas Evidence Code" because there can be no other derivation for its finding of "error."

Notwithstanding the lack of such legal support, however, the decision of the Court of Appeals for the Ninth Circuit discusses the inadmissibility of what it terms "character evidence" and concludes, by ruling, that ". . . [I]t cannot be said that the erroneous introduction of prejudicial evidence in this case was harmless beyond a reasonable doubt." Appendix A, p. 80.

The decision of the Ninth Circuit relies on Chapman v. California, 386 U.S. 18, 24 (1967) which is the usual standard for judging the effect of federal constitutional error. However, that standard is applied where there is "constitutional error", such as denial of

effective assistance of counsel or a violation of the Fourth Amendment.

But even past decisions of the Court of Appeals for the Ninth Circuit have recognized that "[w]here there is no question concerning a federally significant external event, such as the voluntariness of a confession or the knowing use of perjured testimony, state trial court rulings on the admissibility of evidence may not be questioned in a federal habeas proceeding." (Crisafi v. Oliver, 396 F.2d 293, 294-295 (9th Cir. 1983) accord, Chavez v. Dickson, 290 F.2d 727, 736 (9th Cir. 1960); see, also, Oliphant v. Koehler, 594 F.2d 547, 555 (6th Cir. 1979); Cronnon v. State of Alabama, 587 F.2d 246, 250 (5th Cir. 1979); United States v. Neff, 525 F.2d 547, 555 (8th Cir. 1975).)

Instead, the test for determining

whether a state court's admission of evidence violates due process has been that it must be "so prejudicial as to violate fundamental due process and the right to a fair trial." (Cassasa v. Nelson, 452 F.2d 1083, 1084-1085, (9th Cir. 1971).) Had the decision of the Court of Appeals for the Ninth Circuit utilized the proper standard, which would have required it to assess whether the admission of the evidence introduced at respondent's trial was "so prejudicial as to deny the right to a fair trial", then the writ of habeas corpus would not have been granted.

However, since the decision, in contravention of precedent, first found what can only be termed as "constitutional evidentiary error" under its own Federal Habeas Evidence Code, which the decision itself had effectively created, it was

preordained that the decision would find prejudice under the Chapman test, wherein reversal must occur as long as the evidence has any negative impact on the outcome of the trial.

In contrast, under the proper standard of review, which considers only whether the fundamental fairness of the whole trial is compromised by the admission of the evidence, the introduction of the evidence of respondent's knife fascination could not be said to have been "so prejudicial as to deny the right to a fair trial."

The decision's main complaint with the evidence seems to be that it was, in the opinion of the Court of Appeals, illogical but convincing. See Appendix A, p. 78. It is important to note, however, that no federal constitutional authority supports the proposition that a state

trial is "fundamentally unfair" merely because the state has introduced evidence against the defendant that is illogical but convincing.

The federal writ of habeas corpus does not protect a defendant from ordinary grievances concerning state court procedure. See Barclay v. Florida, 463 U.S. 939, 957-958 [103 S.Ct. 3418; 77 L.Ed.2d 185] (1983). The purpose of the writ of habeas corpus is to provide protection of a state prisoner's fundamental rights; not to guarantee him against an illogical conviction. See Strickland v. Washington, 466 U.S. 668, 697-698 [104 S.Ct. 2052; 80 L.Ed.2d 674] (1984).

Lastly, the review of a state court conviction by a federal court on habeas is supposedly less intrusive of the state trial court's province, and even more

deferential thereto, than that conducted by the state appellate courts. Evans v. Muncy, 916 F.2d 163, 166-167 (4th Cir. 1990); accord Wainwright v. Goode, 464 U.S. 78, 83 [104 S.Ct. 378; 78 L.Ed.2d 187] (1983). However, the truth of this proposition could certainly not be demonstrated by a review the decision of the Ninth Circuit here.

When, in California, a state court erroneously admits "character" evidence, the California appellate courts assess the propriety of that admission by an abuse of discretion test. See People v. Maler, 23 Cal.App.3d 973, 981 [100 Cal.Rptr. 650] (1972). In California, there is no error by reason of the admission of any evidence, even prior crimes evidence, unless the state appellate court finds that, notwithstanding its own assessment as to the wisdom of the admission of the

evidence, the error in deciding to admit the evidence was so clear as to constitute an abuse of discretion. See People v. Jackson, 174 Cal.App.3d 260, 266 [220 Cal.Rptr. 39] (1985); People v. Maler, supra, 23 Cal.App.3d at p. 981.

Here, the decision of the Court of Appeals for the Ninth Circuit intrudes into the province of the state trial court much further than would be permissible of a California state appellate court reviewing the admission of the same evidence under its abuse of discretion standard. The decision of Court of Appeals for the Ninth Circuit has interposed its review between that of the California trial court and that of the California appellate court system. As can be seen, the decision's sole expressed legal grievance concerning the admission of the evidence was that the jury was

rendered "inclined to overvalue the evidence." Appendix A, p. 79. This grievance is not one which defers to the judgment of the state trial judge as a California appellate court would have been bound to under its abuse of discretion standard.

Worse still is the difference between the standards utilized by the Court of Appeals for the Ninth Circuit and that of California state appellate courts to determine the "prejudicial effect" of the admission of the evidence. In California, if the state appellate court finds an abuse of discretion due to the admission of evidence and thus "error", the standard of prejudice to be applied is whether it is reasonably probable that a different result would have occurred given the exclusion of the evidence. (See California Evidence Code, § 353.) As

such, in California, reversal is not required unless it is "reasonably probable" that the admission of the evidence may have served to convert an acquittal into a conviction.

However, the decision of the Court of Appeals for the Ninth Circuit holds that reversal was required unless it could be demonstrated that the admission of the evidence was harmless beyond a reasonable doubt. Appendix A, p. 80. Not only is this standard obviously more intrusive of the province of the trial court than is the California state appellate court standard for reviewing the identical error, but, as demonstrated above, unlike cases of intrinsic federal constitutional error such as illegal search and seizure, the standard is erroneous because there is no "error" per se in the admission of any evidence at a state trial that exists

apart from the fact that it denies a fair trial.

In other words, when the evidence denies a fair trial, there is reversible "error"; when it does not, there is no federal "error" whatsoever. Contrary to the finding of the decision below, there is no "in between" in which to apply a harmless error analysis such as that in Chapman.

In view of the proper method of analyzing the admission of evidence at a state court trial with respect to the constitutional guarantee of due process, the Court of Appeals for the Ninth Circuit erred in not determining whether, standing alone, the admission of this evidence so overwhelmed all other aspects of the trial as to convert the whole trial into something that was fundamentally unfair, i.e., inconsistent with the rudimentary

requirements of fair play and justice, in other words, a farce and a sham. As can be seen, the Court of Appeals for the Ninth Circuit could hardly have so found, given the nature of its solely announced complaint which was merely that the state court jury was, by reason of the admission of this evidence, "inclined" to "overvalue it." Appendix A, p. 79.

In conclusion, petitioner urges that since there exists no Federal Habeas Evidence Code and no such thing as "constitutional evidentiary error", a due process "error" in the admission of the evidence does not exist independently of the sole finding that the admission rendered the whole trial fundamentally unfair. As such, no outcome-determinative test such as is contained in Chapman v. California, supra, is relevant because the denial of a fair trial can never be

harmless error.

More importantly, since state law does not apply on federal habeas review and since federal law is inapplicable to state trials (see discussion infra), the admission of the evidence can never be said to be intrinsically "error." Thus, there is simply no predicate "error" upon which to justify use of the test utilized below by the Court of Appeals for the Ninth Circuit. Appendix A, p. 80.

This being true, the holding here represents such a significant departure from established law (and the decision sanctions such a departure by the lower court) that this Court should exercise its supervisory power to review and correct the departure by way of the writ of certiorari.

CONCLUSION

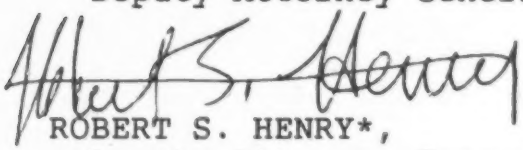
For the foregoing reasons, petitioner respectfully requests that the Petition for Writ of Certiorari should be granted.

DATED: January 29, 1991

Respectfully Submitted,

DANIEL E. LUNGREN,
Attorney General

RICHARD B. IGLEHART,
Chief Assistant
Attorney General
JOHN R. GOREY, Supervising
Deputy Attorney General



ROBERT S. HENRY*,
Deputy Attorney General

ATTORNEYS FOR PETITIONER
*Counsel of Record

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL SHERIDAN McKINNEY,	No. 89-55869
Petitioner-Appellee,	D. C. No. CV 87-5448-RJK (S)
vs.	MEMORANDUM*/
ROBERT M. REES, SUPERINTENDENT OF DEUEL VOCATIONAL INSTITUTION, and ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, JOHN K. VAN DE KAMP,	
Respondents-Appellants.	

Appeal from the United States
District Court for the Central
District of California
Robert L. Kelleher, District Judge,
Presiding Argued and Submitted
June 4, 1990

Before: BROWNING and PREGERSON, Circuit

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*. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

Judges, and ORRICK,**/
Senior District Judge

Respondents-appellants, Robert M. Rees, Superintendent of Deuel Vocational Institution, and Attorney General of the State of California, John K. Van de Kamp ("State"), appeal the conditional grant of writ of habeas corpus entered by the United States District Court for the Central District of California in which the court found that petitioner-appellee, Michael Sheridan McKinney ("McKinney"), was denied his right to a fundamentally fair trial. We affirm.

I

McKinney was convicted by a jury in the Superior Court of Los Angeles, State of California, of the first degree murder

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**. Honorable William H. Orrick, Senior United States District Judge for the Northern District of California, sitting by designation.

of his adoptive mother. He appealed his conviction to the Court of Appeal, which affirmed his conviction. He failed to file a timely petition for review of his conviction in the California Supreme Court because his counsel miscalculated the dates and filed the petition for review one day late. McKinney then filed a petition for writ of habeas corpus in the California Supreme Court, alleging ineffective assistance of counsel for failure to file a timely request for review that resulted in the loss of his opportunity to have that Court consider four arguments as to why his conviction should be reversed. The four arguments were specified in the petition for a writ of habeas corpus and a copy of his petition for review was attached as an appendix. The petition for a writ of habeas corpus was summarily denied by the

California Supreme Court.

McKinney then filed a petition for habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Central District of California. The petition was referred to a magistrate. The State filed its return to the order to show cause alleging failure to exhaust state remedies. The magistrate found that McKinney had exhausted his state remedies and issued an order requiring the State to file a supplemental return addressing the merits of the petition. The State filed a supplemental return, the magistrate issued a preliminary report, and McKinney and the State filed timely objections. The State's objections were directed to the merits of the petition and did not address the exhaustion issue. After consideration of the objections, the magistrate issued a final report and

recommendation ("report"). The district court filed an order adopting the report and entered a judgment that conditionally granted the writ of habeas corpus and ordered McKinney's release from custody unless charges were refiled against him within ninety days of the date of entry of judgment. The State then filed this appeal.

The district court granted the writ of habeas corpus because the use of character evidence to show that McKinney had the propensity to commit the crime for which he was charged resulted in a trial that was fundamentally unfair. This conclusion was based on the introduction at trial of the following evidence:

1. McKinney's mother was murdered at home in her bed by four cuts to her throat and chest with a knife and/or other sharp-edged instrument. The murder weapon

was never recovered. There were no signs of forced entry to the victim's home. Present at the time of the victim's murder were her husband, Quentin McKinney, and her son, McKinney. There were no witnesses to the commission of the murder and no confession of guilt.

2. Evidence found at the McKinney home included the following: a pair of McKinney's camouflage pants and a towel stained with blood of the victim's type in the den; a tee shirt of Quentin McKinney's stained with blood of the victim's type in the bathtub; blood stains of the victim's type on the bathroom sink; a pair of ski gloves stained with blood of the vadium's type on a kitchen cabinet; and blood stains of the victim's type on three telephones.

3. Quentin McKinney was wearing a folding "Buck" knife when the police

arrived at the McKinney home. The day after the murder, Quentin McKinney presented the police with a second pair of McKinney's camouflage pants, which he stated he found in the closet with McKinney's other clothes in the bedroom where he (Quentin) had been sleeping on the night of the murder.

4. The prosecutor introduced into evidence a "Gerber" dagger and a "Tekna" dagger that were previously owned by McKinney. The Gerber dagger had been taken and kept in custody by a Los Angeles Police Officer four months before the murder. The Tekna dagger had been given to a friend approximately three months before the murder. The prosecution also introduced into evidence a new Tekna dagger that had been purchased by the prosecution for use at trial.

5. A witness testified that once or

twice he had seen McKinney wear a knife strapped to McKinney's leg, and that he had observed McKinney carve the words "Death is His" on a closet door in his dorm room and then stick the knife in the wall and leave it there. The witness then identified two color photographs of the "Death is His" writing and the photographs were introduced into evidence. He testified that he had seen McKinney sharpen the knife on several occasions, and that during a power outage at school, McKinney had strapped his knife on, went out somewhere, and stayed out half the night.

6. The county deputy medical examiner testified that the victim suffered four wounds that were caused either by cutting or stabbing, that the wounds could have been inflicted by various types of knives, including a knife

sharpened on both sides, a knife sharpened on one side with a thin dull side, a double edged dagger, a weapon with a sharp edge, or a pointed weapon with at least one sharp edge. He testified that two of the four wounds could have been caused by a class of knives such as the new Tekna knife purchased by the prosecution, and that the neck wounds that had caused the death could have been made by any instrument with a sharp edge, including a razor blade. On cross-examination, he testified that the victim's wounds could have been inflicted by a Tekna, a Gerber, a folding Buck knife, a kitchen knife, or a knife that could be found in a typical home.

7. When McKinney was cross-examined, the prosecutor was permitted to question him about the knives he had previously owned and sold, whether he had

a fascination with knives, liked knives, liked owning knives, liked to stop and look at knives in store window, liked to examine knives, often talked about knives, if knives were his hobby, and about why he had owned knives of certain types and colors at time periods before the murder. The prosecutor then asked McKinney whether he "was familiar with some of the various techniques that, for example, are used in combat or that are used by commando type soldiers. . . ." R.T. 751-52. McKinney testified that he once dressed up like a soldier for fun, with a Tekna knife on his arm, and went to see the movie "Apocalypse Now." The prosecutor then established that McKinney purchased a knife that was "favored . . . by commando type people . . . ." (R.T. 751.)

8. In his argument to the jury, the prosecutor expressed the view that

McKinney's history of knife ownership was one of three main areas of evidence that were relevant to prove McKinney's guilt. At another point, the prosecutor stated to the jury that the knives were one of two subjects in which they should be most interested. He argued that the victim was probably killed with a double-edged knife, although the evidence did not actually support this assertion, and related that "fact" to the knives that McKinney had owned and suggested that they could have been the murder weapon. The prosecutor referred frequently to McKinney's knives throughout his argument, and declared that McKinney had an "obsession with knives . . . [i]n particular, double edged daggers." R.T. 1080.

II

The issues before this court are whether (1) the State waived the argument

that McKinney failed to exhaust his state remedies, (2) McKinney exhausted his state remedies, (3) McKinney was convicted on the basis of erroneously admitted character evidence, and (4) erroneous admission of character evidence was so significant it rendered McKinney's trial fundamentally unfair in violation of his federal constitutional right to due process.

A.

McKinney suggests that the State's failure to reassert an objection to the report on the basis of his failure to exhaust state remedies constituted a waiver of his right to raise that issue on appeal.

Exhaustion was raised in the State's first return, at the exclusion of all other defenses. The magistrate rejected the State's argument on exhaustion and

ordered it to address the merits of the petition. After considering the parties arguments on the merits, the magistrate issued his report. The report did not address the issue of exhaustion of state remedies. Failure to raise the exhaustion issue again in its objection to the report, which did not touch on this issue, cannot be viewed as consent to the finding of exhaustion or waiver of the right to raise the issue on appeal.

McKinney argues that in this circuit it is well settled that a party's failure to file objections to a magistrate's proposed finding of fact with the district court waives the opportunity to contest those findings on appeal. Greenhow v. Secretary of Health & Human Services, 863 F.2d 633, 635 (9th Cir. 1988); Britt v. Simi Valley Unified School District, 708 F.2d 452, 454 (9th Cir. 1983).

In the context of this case, the question of whether McKinney exhausted his state remedies is essentially a legal question; the Court is not concerned with whether any petition was filed, but rather with whether the petition that was filed was legally sufficient for purposes of exhaustion. Id. at 454. There is conflicting authority in this circuit over whether failure to raise objections to a magistrates conclusions of law constitutes waiver of those issues on appeal. Compare McCall v. Andrus, 628 F.2d 1185, 1187 (9th Cir. 1980), cert. denied, 450 U.S. 996 (1981) (failure to object to legal conclusion is waiver) with Britt, 708 F.2d at 454 (failure to object to legal conclusion is not waiver). In Greenhow, 863 F.2d at 635, this court noted but did not reconcile the conflicting lines of authority on this issue because

intracircuit conflict can only be resolved by the court en banc. Fed. R. App. P. 35(a); Tornay v. United States, 840 F.2d 1424, 1427 n. 3 (9th Cir. 1988). In Greenhow, this Court chose to follow the Britt rule because it had been followed in three Ninth Circuit opinions subsequent to Britt, and might reasonably have been relied upon by the parties as a correct statement of the law in the circuit.

We follow Britt rule in this instance for the same reason. The issue of whether McKinney exhausted his state remedies is a question of law. The State's right to appeal this issue is not waived by failure to object to the magistrate's conclusion that McKinney exhausted his state remedies.

B

The doctrine of exhaustion of state remedies requires McKinney to give the

highest state court a "fair opportunity" to consider his federal claims. Picard v. Connor, 404 U.S. 270, 276 (1971). The petition is sufficient for exhaustion purposes if the petitioner describes the "operative facts and legal theory" upon which the federal claims are based. Tamapua v. Shimoda, 796 F.2d 261, 262 (9th Cir. 1986). Exhaustion requires "only that the substance of the federal claim be fairly presented" to the state court. Id. (citing Picard, 404 U.S. at 278.)

McKinney's petition for a writ of habeas corpus presented to the California Supreme Court raised ineffective assistance of counsel for failure to file a timely petition for review in that court, which resulted in the los of McKinney's opportunity to present to that Court his arguments with respect to why his conviction should be overturned. The

petition referred directly to four grounds on which he believed his conviction should be overturned and then attached his untimely petition for review as an appendix.

In Kim v. Villalobos, 799 F.2d 1317, 1320 (9th Cir. 1986), this court ruled that the petitioner had fairly presented his claims to the California Supreme Court by including his earlier petition to the California Court of Appeal as an exhibit to his petition for writ of habeas corpus. Here, explicit reference to the four issues in the petition and inclusion of the petition for review as an appendix constituted "fair presentation" of the issues to the California Supreme Court.

The fact that the California Supreme Court summarily denied the petition is no indication that the issues were not fairly presented to that Court. It is well

settled in this circuit that a petitioner who files a habeas corpus petition that fairly presents the claims to the highest state court and receives a "postcard denial" has exhausted his or her state remedies. Harris v. Superior Court, 500 F.2d 1124, 1128 (9th Cir. 1974) (en banc), cert. denied, 420 U.S. 973 (1975).

C.

Pursuant to California law, evidence of a criminal defendant's prior conduct is inadmissible if its sole purpose is to show his disposition or propensity to commit the offense charged. Cal. Evid. Code § 1101. Section 1101(a) provides that "evidence of a person's character or a trait of his or her character (. . . or evidence of specific instances of . . . conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." As with Rule 404 of the

Federal Rule of Evidence, character evidence may come in "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity . . .) other than his or her disposition to commit such a crime." § 1101(b).

The primary purpose of this rule, known historically as the "character rule," is to ensure that a jury will not convict a defendant of a current charge just because he has been a "bad person in the past. People v. Alcala, (1984) 36 Cal.3d 604, 205 Cal.Rptr. 775. Improper use of character evidence can deny a defendant a fair trial. Michelson v. United States, 335 U.S. 469, 475-76 (1948) ("[T]he state may not show defendant's prior trouble with the law . . . not . . . because character is irrelevant; on the contrary, it is said to weigh too much

with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.").

Evidence of McKinney's prior ownership and use of knives, and of his "fascination" with knives, was erroneously admitted to show that he acted in conformity with his character rather than to connect him to the crime with which he was charged. Although the prosecutor argued that the evidence of prior ownership and use of knives would be useful in connecting McKinney to the crime with which he was charged, none of the three knives introduced into evidence were in McKinney's possession at the time of the murder, and none were ever connected to the crime. Additionally, the medical examiner testified that the murder weapon might have been a kitchen knife, a folding

buck knife as was possessed by McKinney's father, a double-edged dagger, or a single-edged knife. Similarly, the fact that McKinney carved the words "Death is His" on his dorm closet door only added to the impression that he had a predisposition for violence, but had no relevance to the crime with which he was charged. Finally, evidence that McKinney liked to dress up like a soldier and had a fascination with "commando" activities is the type of evidence likely to stimulate an emotional reaction against McKinney. The prejudice to McKinney that resulted from the introduction of character evidence far outweighed the probative value of that evidence.

D.

The question of whether the erroneous admission of character evidence rose to the level of a constitutional

violation depends on whether the questionable evidence was so prejudicial that it rendered McKinney's trial fundamentally unfair. McGuire v. Estelle, No. 87-2522, slip op. 4355, 4362 (9th Cir. May 4, 1990).

Had the prejudicial evidence not been admitted, the jury would have been left to weigh evidence that both McKinney and his father were home at the time of the murder, and that both possessed or had access to knives that could have caused the injuries to the victim. A pair of McKinney's blood-stained pants to which Quentin McKinney may have had access on the night of the murder, Quentin's blood-stained tee shirt, and a pair of blood-stained ski gloves were found at the McKinney home after the murder.

The crucial question at McKinney's trial was who committed the murder. In

order for evidence of a prior act to be admitted to show identity, it must have some tendency to prove the defendant's identity as the perpetrator of the charged offense. "[T]he [prior act and the charged offense]must have enough shared characteristics to raise a strong inference that they were committed by the same person . . . . It is not enough that the two acts contain common marks." People v. Riviera, 41 Cal.3d 388, 392 (1985) (en banc).

McKinney's past acts were not similar enough to the acts with which he was charged to be viewed as probative evidence on the issue of whether he committed the murder. The State suggests that the questionable evidence provided a logical link between the crime and the defendant" "[T]his evidence had, at least, a logical tendency to prove that if

petitioner was fascinated with knives, he committed the knife killing; if he lived a "commando lifestyle", he was guilty of the "commando killing' of his mother; and that if he scratched the words, "Death is His" with a knife on his dormitory door, he had a knife that had not been accounted for in the intervening period of time, which includes the date of the knife murder. Given the presence of this logical nexus, it is difficult to conceive of how this trial could be judged to be fundamentally unfair." State's Brief at 42.

The problem with the State's analysis is that this is precisely the type of "logical nexus" that the character rule is designed to prevent because juries will be inclined to overvalue the evidence. The questionable evidence in this case is prejudicial for the

additional reason that it is likely that it stimulated an emotional reaction against McKinney.

Although there was circumstantial evidence of McKinney's guilty, it cannot be said that the erroneous introduction of prejudicial evidence in this case was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967); McGuire, slip op. at 4367 ("Although there was evidence suggesting [petitioner's] guilt, this evidence was certainly not overwhelming"); Dudley v. Duckworth, 854 F.2d 967, 972 (9th Cir. 1988) (error not harmless even when evidence of petitioner's guilt was "impressive but not overwhelming").

Given the inherently prejudicial nature of the evidence, coupled with the improper emphasis placed on this evidence by the prosecutor, we conclude that

McKinney's trial was fundamentally unfair.

AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL SHERIDAN MCKINNEY,	) No. 89-55869
Petitioner-Appellee,	) D.C. No. CV 87-5448-RJK (S)
v.	) ORDER
ROBERT M. REES, Superintendent; JOHN K. VAN DE KAMP,	)
Respondents-Appellants.	)

Before: BROWNING and PREGERSON, Circuit Judges, and Orrick*/ District Judge

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and

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* The Honorable William H. Orrick, Senior United States District Judge, District of Northern California, sitting by designation.

no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. p. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT

OF CALIFORNIA

MICHAEL SHERIDAN MC KINNEY,	)	
Petitioner,	)	Case No. CV87-5448-RJK (B)
v.	)	
ROBERT M. REES, SUPERINTENDENT, et al.,	)	ORDER
Respondents.	)	

In this habeas corpus action, a Return was timely filed and the Magistrate has determined to accept the Traverse, although it was filed seven days late.

Respondent, alleging nonexhaustion of state remedies, has not briefed the merits of the contentions raised in the petition. As to exhaustion, a direct appeal to the California Supreme Court from the affirmance of the California Court of Appeal was rejected when

appellate counsel filed one day out-of time. Appellate counsel then sought review by the High Court by means of habeas corpus, admitting that he was "ineffective" for having miscalculated the last day upon which to file the appeal, and praying that the court "grant this petition for writ of habeas corpus and reverse the trial court judgment of conviction" on the "issues . . . contained in the petition." Return, page 308, emphasis added. The issues so contained include all of those sought to be raised in this action. Return, pp. 307-308. Appellate counsel asked the California Supreme Court to "consider the merits of issues not preserved on appeal by granting the petition for writ of habeas corpus." Return, page 213. The same issues unsuccessfully presented to the California Court of Appeal, and which are raised in

this action, were then briefed to the California Supreme Court. Return, pp. 314 et seq. It was this petition which the latter court denied on September 24, 1986. Return, page 4.

The Magistrate now accordingly holds that petitioner has sufficiently exhausted in California courts the issues he seeks to present herein. His subject claims have been fairly presented to the highest court of the state. Picard v. Connor, 404 U.S. 270, 276-78 (1971); Tamapua v. Shimoda, 795 F.2d 261, 262 (9th Cir. 1986).

IT IS THEREFORE ORDERED that the respondent herein, or the California Attorney General, shall serve and file a Supplemental Return, addressing the merits of the petition, on or before March 28, 1988.

IT IS FURTHER ORDERED that

petitioner may serve and actually file his Supplemental Traverse on or before May 2, 1988. The matter shall stand submitted on the papers then on file on the earlier of the court day after the filing of the Traverse on May 3, 1988.

DATED: February 19, 1988.

VOLNEY V. BROWN, JR.
United States Magistrate

APPENDIX D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL SHERIDAN McKINNEY Petitioner, v. ROBERT M. REES, SUPERINTENDENT, et al., Respondents.	) Civil No. CV 87-5448-RJK(S))) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE ON A PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

This Report and Recommendation is submitted to the Honorable Robert J. Kelleher, United States District Judge, pursuant to the provisions of 28 U.S.C. section 636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

BACKGROUND

Petitioner is incarcerated at the Deuel Vocational Institution, Tracy, California. He was convicted in the California Superior Court of first degree murder, and was sentenced to a state prison term of twenty-six years to life. Petitioner's conviction was affirmed on appeal to the California Court of Appeal, and his petition for writ of habeas corpus to the California Supreme Court was denied.

On August 18, 1987, Petitioner filed a Petition For Writ of Habeas Corpus in this Court. Petitioner claims that he was denied his Federal constitutional right to Due Process of law as a result of the admission at trial of evidence of his prior ownership and use of knives. He argues that the admission of this evidence made his trial fundamentally unfair.

APPLICABLE LEGAL PRINCIPLES

1. In order to be entitled to Federal habeas corpus relief, a state prisoner must show that he is in custody in violation of the Constitution or laws of the United States. 28 U.S.C. 2254(a).

2. The erroneous admission of evidence in a state criminal proceeding does not necessarily impinge on a defendant's Federal Constitutional rights. However, an erroneous evidentiary ruling which is so significant that it deprives a defendant of his right to a fundamentally fair trial constitutes a denial of Due Process under the Constitution of the United States. McGuire v. Estelle, No. 87-2522, slip op. at 4829 (9th Cir. May 8, 1989); Kealohapauole v. Shimoda, 800 F.2d 1463 (9th Cir. 1986); Palmer v. DeRobertis, 738 F.2d 168 (7th Cir. 1984); Batchelor v.

Cupp, 693 F.2d 859 (9th Cir. 1982).

3. Pursuant to California law, evidence of a criminal defendant's prior conduct is inadmissible if its sole relevance is to show his disposition or propensity to commit the offense charged. California Evidence Code section 1101; People v. St. Andrew (1980) 101 Cal.App.3d 450, 161 Cal.Rptr., 634. The primary purpose of this rule (known historically as the "character rule") is to ensure that a jury will not convict a defendant of a current charge just because he has been a "bad" person in the past. E.G., People v. St. Andrew, supra; see also United States v. Brown, No. 86-5306, slip op. at 4383, 4386-4387 (9th Cir. April 27, 1989); People v. Alcala (1984) 36 Cal.3d 604, 205 Cal.Rptr. 775.

4. "Evidence that a defendant had in his possession a weapon that could

not have been used in the crime charged leads logically only to an inference that such defendant is the kind of person who surrounds himself with deadly weapons - an inference of no relevant consequence to a determination of guilt or innocence." People v. De La Plane (1979) 88 Cal.App.3d 223, 240, 151 Cal.Rptr. 843, 852; People v. Henderson (1976) 58 Cal.App.3d 349, 360, 129 Cal.Rptr. 844, 850-851.

5. Pursuant to California law, the trial court has the discretionary power to exclude evidence which is otherwise admissible, if the probative value of the evidence is substantially outweighed by the probability that its admission will "create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." California Evidence Code section 352(b).

6. In a Due Process analysis of

the admission of questionable evidence, the issue to be determined is whether or not the probative value of the evidence outweighed the prejudice to the accused. McGuire v. Estelle, No. 87-2522, slip op. at 4829, 4836 (9th Cir. May 8, 1989), citing with approval Palmer v. DeRobertis, 738 F.2d 168, 171 (7th Cir. 1984).

EVIDENCE PRESENTED

The Reporter's Transcript (R.T.) of the trial shows the following:

a. Late on the night of January 28, 1984, Betty McKinney was murdered at home in her bed. Her throat had been cut by a knife or other sharp-edged instrument. The murder weapon was never recovered. There were no signs of forced entry to the victim's home. Present at the home at the time of the murder were two other persons: Quentin McKinney, the

victim's husband; and Michael McKinney (Petitioner), her eighteen-year old adopted son who was a college student at that time. Both men testified at the trial. The testimony of each one exculpated himself but left open the possibility of the guilt of the other. There were no witnesses to the commission of the murder, and no confessions of guilt. The prosecution's case was based on circumstantial evidence, most of which raised equivocal inferences.

b. Prior to commencement of the trial, the court and counsel dealt with disputed evidentiary issues, out of the presence of the jury. One of the issues pertained to evidence that Petitioner had owned and used knives at times prior to the commission of the murder. The prosecutor stated his intention to introduce a knife which Petitioner had

owned and which had been seized from him and permanently retained by the police in September of 1983 (4 months before the murder). The prosecutor intended to show Petitioner's "fascination" with certain types of knives. (R.T. 28, 32, 35) Other knives which Petitioner had owned were also going to be presented. (R.T. 29) Defense counsel objected to the introduction of any such evidence as being violative of the "character rule." (R.T. 30-31, 36) The court ruled that the evidence was admissible. (R.T. 36-37)

c. During the testimony of Quentin McKinney, Petitioner's father (by adoption), the prosecutor was permitted to show the witness the "Gerber" dagger (Exhibit 9) and "Tekna" dagger (Exhibit 10) which were previously owned by Petitioner, and asked whether he had ever seen them before or known Petitioner to

have owned one of them. (R.T. 116-117) The prosecutor was also permitted to ask whether Petitioner had ever told him that the police had taken a knife from Petitioner in September of 1983. (R.T. 121-122)

d. Los Angeles Police Department (LAPD) Officer Smith was permitted to testify that on September 25, 1983, [four months prior to the murder] he took a double-edged Gerber knife (Exhibit 9) from Petitioner. (R.T. 373-374)

e. Constantine Potamianos, a friend of Petitioner, was permitted to testify as follows: that prior to the date of the murder, he had known Petitioner to possess dagger type knives which were sharpened on both edges (R.T. 411); that Petitioner had the Gerber and Tekna knives (Exhibits 9 & 10) with him during the summer of 1983 [six months

prior to the murder] on a trip to Mexico (R.T. 411-412); that Petitioner gave the Tekna knife (Exhibit 10) to Potamianos prior to Thanksgiving of 1983; that Potamianos gave it to the prosecution shortly before trial (R.T. 414-416; that he knew Petitioner's Gerber knife had been taken from him by the police in September of 1983 (R.T. 415-416).

f. Christopher Roderick, who shared a college dormitory room with Petitioner, was permitted to testify as follows: that between late August and the beginning of December, 1983, Petitioner had a single-edged knife and a double-edged knife (R.T. 436-437); (the witness made a drawing of the double-edged knife, which was received in evidence) (R.T. 438 & 927); that he became aware in September or October of 1983 that the police had taken a knife from Petitioner (R.T. 439);

that he overheard Petitioner on the telephone talking about the knife which the police had taken, apparently upset because it was his favorite knife (R.T.439-440); that Exhibit 11 [a new Tekna knife purchased by the prosecution for use at the trial] closely resembled a knife Petitioner had at school (R.T. 440); that he saw Petitioner wear the knife once or twice strapped to his leg (R.T. 441); that he saw the knife out of its carrier once or twice (R.T. 441); that one evening between Thanksgiving and December 9, 1983, he observed Petitioner use the Tekna knife to scratch some words on a closet door at the dorm (R.T. 445-447); that the words Petitioner scratched on the door were "Death is his" (R.T. 448); that Petitioner then stuck the knife in the wall and left it there (R.T. 447). The witness then identified two color photographs of the

"Death is his" writing on the wall as being accurate depictions; the prosecutor was permitted to place the color photographs in evidence (R.T. 449 & 927). Roderick was again called upon to testify that Petitioner strapped on a Tekna knife at school (R.T. 450); that the knife closely resembled the knife which the prosecutor had purchased for use at the trial (R.T. 455-457); and that Petitioner stuck the knife in the wall after scratching "Death is his" on the door (R.T. 457). And again the color photographs were reviewed with the witness (R.T. 457). Roderick was permitted to testify that he saw Petitioner sharpening the knife two or three times at the dormitory (R.T. 457); that on at lease four occasions he saw Petitioner strap the knife on at school (R.T. 458); that during a power outage at school, Petitioner

strapped his knife on, went out somewhere and stayed out "half the night" (R.T. 458-459).

g. Dr. William E. Sherry, a county deputy medical examiner, testified in pertinent part as follows: that the victim suffered four wounds which were caused by either cutting or stabbing (R.T. 470); that the wounds could have been inflicted by various types of knives, including: a knife sharpened on both sides (R.T. 483); a knife sharpened on one side with a thin dull side, such as a kitchen or restaurant steak knife (R.T. 483-484); a double edged dagger (R.T. 484); a weapon with a sharp edge (R.T. 493); a pointed weapon with at least one sharp edge (R.T. 493). Dr. Sherry testified that two of the four wounds could have been caused by a class of knives such as Exhibit 11 [the new Tekna

knife purchased by the prosecution] (R.T. 496); that the neck wound which caused death could have been made by any instrument with a sharp edge (R.T. 473-474, 496), including a razor blade (R.T. 499). On cross examination, Dr. Sherry testified that the victim's wounds could have been inflicted by a Tekna, or a Gerber, or a folding Buck knife[1], or a kitchen knife or knives which could be found in a typical home kitchen (R.T. 496-500).

h. Jane Kelsey, a college friend of Petitioner, testified that although she never saw him wearing any knife, Petitioner talked to her about his collection of "valuable knives" on several occasions (R.T. 522).

i. When Petitioner testified,

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1. Petitioner's father, Quentin McKinney, owned a Buck knife.

on cross examination the prosecutor was permitted to question him about: a Smith and Wesson knife he previously owned and sold in June or July of 1983 [six or seven months prior to the murder] (R.T. 744-745); why he had purchased the Smith and Wesson (R.T. 745); whether he had a "fascination" with knives (R.T. 746); whether Petitioner "liked" knives (R.T. 746); whether Petitioner "liked" owning knives (R.T. 746); whether Petitioner "liked" to stop and look at knives in store windows (R.T. 746); whether Petitioner "liked" to "examine" knives (R.T. 746); whether Petitioner often talked to Jane Kelsey about knives (R.T. 747); whether knives were Petitioner's "hobby" (R.T. 747); whether Petitioner "enjoyed" "collecting" and "talking about the different types of knives" he had (R.T. 747). Petitioner was cross examined

endlessly about why he had owned knives of certain types and colors at time periods months before the murder took place (R.T. 747 et seq.).

j. In his argument to the jury, the prosecutor expressed the view that Petitioner's history of knife ownership was one of three main areas of evidence which were relevant to prove Petitioner's guilt (R.T. 1007-1008, 1027). At another point, the prosecutor stated to the jury that the knives were one of two subjects they should be "most interested in" in deciding the case (R.T. 1021). He argued that the victim was probably killed with a double edged knife[2/], and related that "fact" to knives which Petitioner had owned and which could have been the murder

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2. The evidence did not actually support this assertion. See the summary of the testimony of Dr. Sherry.

weapon (R.T. 1008-1010, 1076). He then recounted the incident in which a Gerber dagger was taken from Petitioner by police on September 25, 1983, and described its seven-inch double edged blade (R.T. 1011). He failed to point out that the Gerber knife was retained by the police, and could not have been the murder weapon.

Consistent with his theory of the case, the prosecutor recounted the testimony of Petitioner's college roommate that Petitioner had two knives at school, and carved "Death is his" on a closet door (R.T. 1015). The prosecutor referred frequently to Petitioner's knives throughout his argument (R.T. 1015-1016, 1018, 1021, 1022-1023, 1027, 1045, 1046, 1069, 1080), and went so far as to declare that Petitioner "had an obsession with knives - in particular, double edged daggers." (R.T. 1080) The prosecutor

made much of the fact that Petitioner had "talked about knives quite often" to a college friend, and seemed to be very proud of his knives (R.T. 1022). In his argument, the prosecutor translated the evidence of Petitioner's prior ownership of knives into the present ownership of "knives" at the time the murder took place (R.T. 1064).

DISCUSSION

The evidence of Petitioner's prior ownership and use of knives was presented by the prosecution on the stated premise that such evidence was directly admissible on the issue of Petitioner's guilt of the murder which was committed on January 28, 1984, and was of crucial importance. Pursuant to this theory, the prosecution was permitted to show: that Petitioner had owned a Smith and Wesson knife, which he sold during the summer of

1983; that he had owned a Gerber knife, which was permanently taken from him by the police in September of 1983; that he had owned a Tekna knife which was given to a friend prior to Thanksgiving of 1983, although one witness testified that he saw Petitioner with it possible as late as December 9, 1983[3/]; that Petitioner "liked" knives, talked about them, wore one strapped to his leg, and used one to carve "Death is his" on a closet door. The prosecutor argued that Petitioner had a "fascination" for knives, and heavily relied on the testimony concerning Petitioner's prior activity with knives in urging a conviction. In summary, the prosecution painted a picture of an

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3. The witness who testified in court that Petitioner may have had the Tekna knife as recently as December 9, 1983, had initially told the police that he last saw Petitioner with the knife in October of 1983.

obsessive, knife-wielding defendant, and based a large part of its case on the concept that this materially contributed to the proof of Petitioner's guilt.

It is the opinion of the Magistrate that none of the evidence of Petitioner's prior possession and use of knives should have been admitted in evidence at the trial. The only logical inference raised by such evidence is that Petitioner was the kind of person who surrounded himself with deadly weapons, and he therefore had a disposition or propensity to commit the offense charged. This is precisely the kind of evidence which the "character rule" as codified in California Evidence Code section 1101 was intended to exclude.

Moreover, even if a technically valid basis for the admission of some small part of this evidence can be put

forward, such arguments must fail in light of California Evidence Code section 352. For example, the effect on the jury of testimony of Petitioner having carved "Death is his"[4] on the closet door of his college dorm was undoubtedly devastating. The admission of such evidence cannot be justified as helping to pin down a discrepancy in dates, and should have been excluded under section 352.

Due Process analysis requires weighing the value of the improperly admitted evidence against the prejudice suffered by Petitioner as result of its admission. As was noted above, the evidence had little or no value because it raised improper inferences which violated the character rule. The prejudice to

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4. No evidence was presented to explain the meaning of these words or to connect them in any way to the crime charged.

Petitioner was substantial; he was tried and convicted as much on evidence of his past history with knives as he was on evidence directly related to the murder. The evidence against Petitioner was entirely circumstantial, and was far from overwhelming. Petitioner's credibility was critical to his defense. After a review of the entire record of proceedings in the trial court, the Magistrate finds that Petitioner would probably not have been convicted if it were not for the improperly admitted evidence. Therefore, the Magistrate finds that Petitioner was deprived of his right to a fundamentally fair trial under the Due Process Clause of the Constitution of the United States.

RECOMMENDATION

It is concluded that Petitioner is entitled to a writ of habeas corpus.

The Magistrate recommends that an Order be issued by the Court: (1) approving and adopting this Report and Recommendation; and (2) directing that Judgment be entered issuing a conditional writ requiring the release of Petitioner from custody unless charges are refiled against him within ninety days of the date of entry of judgment herein.

Dated: June 19, 1989

ROBERT M. STONE
United States Magistrate

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL SHERIDAN McKINNEY Petitioner, v. ROBERT M. REES, SUPERINTENDENT, et al., Respondents.	) Civil No. CV 87-5448-RJK(S))) ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE

Pursuant to 28 U.S.C. section 636(b)(1)(B), the Court has reviewed the pleadings and other papers herein, the attached reports and recommendations of the Magistrate and the objections to the Magistrate's initial Report and Recommendation, and approves and adopts the Magistrate's findings, conclusions and recommendations. The Court has made a de novo determination of those portions of the report to which objection has been

made.

IT IS ORDERED that a conditional writ be granted. Petitioner shall be released from custody unless charges are refiled against him within ninety days of the date of entry of judgment herein.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate's reports and recommendations and the Judgment by United States mail on Petitioner and the Attorney General of California.

Dated: July 27, 1989

ROBERT J. KELLEHER
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL SHERIDAN McKINNEY Petitioner, v. ROBERT M. REES, SUPERINTENDENT, et al., Respondents.	) Civil No. CV 87-5448-RJK(S) JUDGMENT

Pursuant to the order of the Court adopting the findings, conclusions and recommendations of the United States Magistrate,

The Petition For Writ Of Habeas Corpus is conditionally granted. Petitioner shall be released from custody unless charges are refiled against him within ninety days of the date of entry of judgment herein.

Dated: July 27, 1989

ROBERT J. KELLEHER
United States District Judge

EXHIBIT E

MINUTES

CALIFORNIA SUPREME COURT

San Francisco,
September 24, 1986

Orders were filed in the following matters denying petitions for writs of habeas corpus:

Crim. 25726 - In re McKinney (Michael Sheridan) on Habeas Corpus.

APPENDIX F

NOT TO BE PUBLISHED
IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE,	
Plaintiff and Respondent,	2d Crim. No. B011378
v.	(Super.Ct.No. A399033)
MICHAEL SHERIDAN McKinney,	
Defendant and Appellant.	

APPEAL from the judgment of the Superior Court of Los Angeles County. Michael Eerg, Judge. Affirmed.

Dennis L. Cava, under appointment by the Court of Appeal, for Defendant and Appellant.

John K. Van De Kamp, Attorney General, Andrew D. Amerson, Supervising Deputy Attorney General, and Lauren D. Dana, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Appellant appeals from the judgment in which he was convicted of the first degree murder of this adoptive mother. He principally contends that statements, taken in violation of his rights under Miranda v. Arizona (1966) 384 U.S. 436, were unlawfully used for impeachment purposes, and he also urges that the trial court erred in the admission of other evidence.

PROCEDURAL HISTORY

The guilty verdict herein was rendered by a jury which also found that appellant, in the commission of the crime, had used a knife within the meaning of Penal Code section 12022, subdivision (b). Appellant was sentenced to state prison for 25 years to life plus one year for the use of the knife.

STATEMENT OF FACTS

Appellant's mother, Mrs. Betty M. McKinney, was killed in her own bedroom on the night of January 28, 1984, by having her throat cut. In the house at the time were appellant and his adoptive father, Mr. Quenten McKinney, a truck driver.

Earlier that evening, shortly after dinner, appellant, a bright college student with a high I.Q., who was home for the semester break, asked his parents for a $3,000 loan to enable him to continue in college. The victim "just flat said no." Appellant indicated he was going to attend a movie with a friend. At about 8:30 p.m., Mr. McKinney went to sleep in a spare bedroom. Appellant was still in the house and Mrs. McKinney was watching T.V.

Between 11 and 11:30 p.m., Mr. McKinney was awakened by a loud noise. He arose to find the lights on in the den

where appellant slept. No lights were on in his wife's bedroom. Hearing a "growling" sound from that bedroom, however, he entered the room to find his wife bleeding from the mouth. At first Mr. McKinney though his wife was hemorraging as a consequence of circulatory problems for which she had had surgery. As Mr. McKinney attempted to assist his wife, he then saw that blood was coming from her neck. He frantically tried to call for assistance on the two phones that were located in the bedroom and failing that yelled loudly for his son. When appellant respondent, Mr. McKinney told him to "get the paramedics." Appellant grabbed the larger of the two phones, a white one, and went into the dining room where he began talking and Mr. McKinney heard the words "operator."

Appellant returned to the bedroom,

put the telephone on the floor and said "they're coming." Expecting to hear the sound of sirens momentarily, Mr. McKinney continued to try to aid his wife. When appellant suddenly uttered an obscenity and broke the telephone on the floor, Mr. McKinney told him to leave the house and to flag down a police car. Appellant departed only to return saying he had seen no police car. Mr. McKinney also instructed his son to run to nearby business establishments where pay telephones were located and to call for help. Appellant again department for a time and when he returned "said he didn't have a dime for the phone." Mr. McKinney told appellant that he didn't need a dime but could just push the "O." Appellant again left the house.

Shortly thereafter, Mr. McKinney, who had been in the military service where

he had experienced the death of others, heard what he termed a "death rattle" from his wife. Believing she was dead, Mr. McKinney went into the den to try the telephone there. He still had heard no sirens but knew that paramedic response was normally rapid. When he picked up that telephone, it was inoperable.

Mr. McKinney then changed some of his bloody clothing and went next door where he yelled for his neighbor to call the paramedics. When Mr. McKinney came back to the front door of his house, he found his son standing there. Mr. McKinney said to him, "If you have done something to Mom, I'll have to get after you." Appellant made no reply.

Shortly thereafter, the paramedics arrived along with police. However, Mrs. McKinney was already dead.

In the opinion of the deputy medical

examiner who performed an autopsy on Mrs. McKinney's body, the cause of death was an eight-inch knife wound on the victim's neck which had severed both a carotid artery and and a jugular vein. Additionally, Mrs. McKinney had suffered stab wounds under her left jaw, to her chest and to the back of her neck. Only the first of the four knife wounds was a fatal one. In the doctor's opinion, the neck and chest stab wounds had been caused by a knife sharpened on both edges.

The police crime scene investigation disclosed no signs of forced entry. A pair of dark camouflage pants belonging to appellant bore blood stains of the same blood type as the victims. Officers also found a pair of blood stained men's ski gloves lying on a kitchen counter. The blood stains were likewise of the same blood type as Mrs. McKinney's.

A telephone cord in the victim's bedroom had been cut by a sharp single-bladed tool and, according to expert testimony, not be any tool such as scissors or shears.

Appellant had owned several knives, including a double-edged "Tekna"knife. In the opinion of the deputy medical examiner, a double-edged knife, similar to the one appellant owned, could have caused the stab wounds to the victim's chest and neck. Appellant had been observed by acquaintances sharpening a knife on occasions. Witnesses also testified that in December 1983, appellant had used a knife to scratch on a dormitory room closet door the inscription "Death is his." On previous occasions, appellant had also strapped the Tekna knife to his leg while wearing either jeans or camouflage pants.

Appellant's father owned a folding "Buck" knife which police confiscated and examined. Laboratory analysis proved there were no blood stains anywhere on this knife.

Appellant's father testified that appellant did not get along with his mother, and Jane Kelsey, a close friend of appellant's mother, testified appellant was resentful towards his parents because they pushed him through schools and always expected too much of him. In an introspective letter written by appellant to a girlfriend, appellant at length discussed that he felt "neglected, unloved, even abused" by his parents who were "disappointed with me." He wrote that God had given him a "special gift" (i.e., his high intelligence), and that therefore his parents and teachers had "great expectations for me." He stated

that his parents "were domineering and possessive beyond belief" and that he was "starved for affection." He expressed the thought that he had turned his life into a junkyard and stated that "I cannot emphasize how much I am going to need my good friends."

Valentina Montessori testified that during the preceding Christmas break, appellant had visited her at her home in Vancouver, British Columbia, Canada. During the time that they were together in the outdoors, appellant wore the ski gloves which were found blood-stained in his home on the night of the murder.

DEFENSE

Appellant testified in his own behalf and denied killing his mother. According to his story, he arrived home from the movie theatre at exactly 11 p.m. and was let into the house by his mother.

He immediately went to bed wearing headphones and listening to a 45-minute cassette tape recording. When he awoke the tape recording had run out, and he got up to go to the bathroom. As he went toward the bathroom, he glanced into the bedroom to see his father sitting on the side of his mother's bed calling her name. there was blood everywhere.

Appellant tried to call for assistance but the phones did not work because the cords had been cut. He eventually summoned the paramedics from a pay telephone.

Appellant admitted ownership of the blood-stained camouflage pants but testified that he no longer wore those as he had outgrown them. He and his close friend, Constantine Potamianos, testified that the blood-stained gloves were not his and that another pair, given to the

prosecution by Potamianos, were in fact the gloves he had worn in Canada. His friend also testified that appellant had given him the Tekna knife prior to Thanksgiving of 1983.

APPELLANT'S CONTENTIONS

Appellant contends that the trial court committed prejudical errors by admitting the following into evidence:

1. Appellant's prior inconsistent statements obtained by police in violation of Miranda.

2. Appellant's possession of two knives prior to the killing of the victim.

3. A letter written by appellant to a friend expressing resentment and hostility toward his parents.

4. Evidence of appellant's obsession with knives and with a commando lifestyle.

DISCUSSION

I

Appellant contends that the trial court improperly admitted prior inconsistent statements to impeach his trial testimony, statements taken by police in violation of Miranda v. Arizona, supra, 384 U.S. 436. We uphold the trial court's finding that appellant was properly advised of his Miranda rights and had voluntarily waived them.

The case of People v. Bestelmeyer (1985) 166 Cal.App.3d 520, summarizes the standards of review pertinent here: "It is the function of the trial judge to determine whether the defendant did in fact knowingly and voluntarily waive his right to remain silent and his right to have the assistance of counsel. This determination is to be made based on the totality of the circumstances surrounding the interrogation. (Fare v. Michael C.

(1979) 442 U.S. 707; In re Brian W. (1981) 125 Cal.App.3d 590.) The assertion of privilege or its waiver constitutes a question of fact which can only be decided after talking into account the special circumstances of each case. (People v. Turnage (1975) 45 Cal.App.3d 201.) Where the evidence is in conflict, the trial court's findings in this regard will be accepted by the appellate court unless it is palpably erroneous or entirely unworthy of belief. (People v. Brockman (1969) 2 ;Cal.App.3d 1002; People v. Hutchings (1973) 31 Cal.App.3d 16; People v. Watson (1977) 75 Cal.App.3d 384.)" (People v. Bestelmeyer, supra, at p. 526.)

Two separate police interviews of appellant conducted by Los Angeles Police Department Detectives Gilbert Freeze and John Bunch are at issue herein. The first interview occurred at 6:45 a.m. on January

29, 1984, shortly after appellant's father had been interviewed and released. In this first interview, after Detective Bunch advised appellant of his so-called Miranda rights, Detective Bunch asked him if he understood those rights. Appellant answered "yes." Detective Bunch then asked appellant if he gave up his right to remain silent to which appellant replied, "Sure, why not?" Detective Bunch then asked if appellant gave up his right to speak to an attorney, and appellant responded, "I guess so." Detective Bunch asked, "Is that a yes?" and appellant replied, "OK. I mean why? Why do I need an attorney?" The officer responded, "I don't know. That's what we're here to find out. I don't know if the need an attorney or not." The officer then commenced with his interview informing appellant that he was suspected of killing

his mother. The trial court found that appellant had waived his right consult with an attorney prior to asking the question, "Why do I need an attorney?"

Later that day, appellant was formally arrested and booked. Appellant also agreed to take a polygraph examination but none was administered.

On January 31, 1984, at 6:15 p.m., appellant was readvised of his rights under the Miranda decision, and he again indicated that he understood those rights and he also gave up his right to remain silent. Next, Detective Bunch asked appellant if he gave up his right to an attorney prior to being interviewed, and appellant replied, "I have one question. Can I get an attorney tonight." Detective Bunch answered, "I don't know. If you want an attorney, we won't be talking because I cannot talk to you if you want

an attorney." Thereupon, appellant respondent, "See, O.K. I want an attorney, but I want to talk to you now so I want to talk to you without the attorney. So I guess I should answer yes to that question. But I also want to talk to an attorney." Detective Bunch stated, "But my problem is I can't get an attorney here now" and appellant stated, "You can't?" The detective then said, "No" and appellant stated, "I want to talk to you then." Detective Bunch further asked, "O.K. Is that what you are saying is you will talk to me?" and appellant answered, "Yes." Detective Bunch again asked, "You will talk to me without an attorney being present?" Appellant replied, "Yes I will." During the discussion of the availability of an attorney, Detective Bunch informed appellant that an attorney might not be available until his

arraignment but the detective also stated that he possibly had an after-hours phone number for the public defender.

Appellant testified on this issue that the officer's statement that an attorney was not available until the arraignment was a factor in his decision to talk with the police. He had no money to hire an attorney and would have waited a short while for an attorney before talking to the police. Appellant also testified that during the second interview, it was his desire to talk with the investigators whether or not there was an attorney available.

Our review of the totality of the circumstances in this case convinces us that appellant waived his Fifth Amendment rights on each of the two occasions and that he at no time in fact invoked those rights during the interviews.

Appellant relies on People v. Superior Court (Zolnay) (1975) 15 Cal.3d 729, 736, for the proposition that if a suspect "`indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning.'" (Emphasis omitted.) That case is distinguishable. In that case, both the defendant and his companion waived their Miranda rights and spoke with police at length. The next day, they returned and again talked with police for at least an hour. Finally, one of the two stated either "I guess we need a lawyer" or "Do you think we need an attorney." The officers then referred the two to a telephone directory which listed local attorneys but thereafter told the suspects that they were guilty and urged them to continue talking with them. The differences between the Zolnay situation

and the instant case are fairly obvious. The defendant's statement there that he needed an attorney came long after the previous waiver of the right to counsel and after extended questioning. The suspects there had also asked the officers to recommend an attorney and at that point they were referred to the telephone directory. The circumstances there clearly showed that the defendant was in fact invoking his constitutional right. Nonetheless, the interrogating officers persisted in pressuring the defendant for an admission of guilt.

No such tactics are revealed in the instant case. There are no softening up statements or questions as in People v. Hinds (1984) 154 Cal.App.3d 222, 235, or People v. Munoz (1978) 83 Cal.App.3d 993, 995-996. Rather, when appellant inquired about an attorney, the officers did no

more than seek clarification of his desires. "Clearly the authorities permit clarifying questions even after a suspect says he asserts his constitutional rights, and that proposition finds support in Miranda v. Arizona, [supra], 384 U.S. 436, 485. Nothing in Miranda precludes the police from clarifying with the suspect whether he understands the questions relating to his constitutional rights and whether by his answers he intends to waive them. It is just as important for police to make certain a suspect means what he says in his answer which asserts his rights as it is to ascertain if he understands the questions sufficiently to knowingly and intelligently waive those rights. Although after a suspect has indicated he wishes to invoke his Miranda rights the police are prohibited from asking substantive questions which portend

to develop the facts under investigation (People v. Turnage, [supra], 45 Cal.App.3d 201, 211), they are permitted to clarify whether he comprehended his rights, the question and his answer or intended to waive his Miranda rights, and explain them to him." (In re Brian W., supra, 125 Cal.App.3d 590, 599-600.) Hence, it has been held that "when a suspect is indecisive and ambiguous in his assertion of his Fifth Amendment rights, the officers may make further inquiries concerning it . . . ." (People v. Marshall (1974) 41 Cal.App.3d 129, 135.)

The questions and responses of the police and appellant in the first interview are not unlike the exchange which took place in People v. Maynarich (1978) 83 Cal.App.3d 476 wherein the defendant's statement was held admissible. There, upon being told that an attorney

could be appointed for him, the defendant stated, "But will it make a difference?" The officer replied, "Well, that's your choice. You understand that you are entitled to an attorney?" Defendant replied, "Yes" and finally, "Well, I'll need one, but, you know, you can go ahead and ask me questions." A more explicit waiver followed and the ensuing interview was ruled admissible. (Id., at p. 479.) In the present case, to appellant's question "Why do I need an attorney?" the officer answered, "I don't know. That's what we're here to find out. I don't know if you need an attorney or not."

The second interview is reminiscent of the waiver circumstances in People v. Turnage, supra, 45 Cal.App.3d 201, 211, footnote 5, in which the admission of the defendant's statements were upheld on appeal. There the waiver conversation

between the officer and the defendant was as follows: "A: . . . Yes . . . attorneys and stuff like that I can't afford, one right at the moment. Q: Well, this says that an attorney can be appointed for you. You know if you can't afford one, one will be appointed to represent you. A: Well, I feel I need one. Q: O.K., you'd rather not talk about the case. A: No, I don't mind talking about the case, but I just feel I want it noted that I want an attorney.

"Q: Ok, you want it noted that you do want an attorney? A: Yes, but I don't mind talking to you. Q: Ok. You understand, then, everything that we've talked about and that you do want an attorney but not necessarily at this particular second. Is that right? A: Yes." (Ibid.)

The court in Turnage observed, "Amid

such uncertainly the officer was justified indeed in making further inquiries concerning appellant's intentions. The answers given to these clarifying questions abundantly disclose that appellant was willing to talk about the case and also that he wished to utilize the assistance of an attorney at a later time . . . " (People v. Turnage, supra, at p. 212.)

Here, by telling appellant that "IF you wan an attorney, we won't be talking because I cannot talk to you if you want an attorney," Detective Bunch made it absolutely clear that appellant could cut off any questioning simply by indicating his desire for an attorney. Appellant's response indicates his perception of that point as well as his desire to speak to the officers without an attorney: "See, O.K. I want an attorney, but I want to

talk to you now. So I want to talk to you without the attorney. So I guess I should answer yes to that question. But I also want to talk to an attorney."

After a discussion about the availability of an attorney and the officer's statement that he possibly had an after-hours telephone number for the public defender, appellant stated "I want to talk you then." To clarify any lingering ambiguity, the officer inquired further: "O.K. Is that what you are saying is you will talk to me?" Appellant answered "Yes" and the officer inquired again "You will talk to me without an attorney being present?" To that last question, appellant gave the unambiguous answer which clearly constitutes a waiver, "Yes, I will."

We are thus fully satisfied that appellant did not invoke his Fifth

Amendment rights and just as clearly waived them. Furthermore, there is obviously no issue of voluntariness related thereto since there were no promises nor any hints of favors nor any direct or subtle threats made to appellant. And, of course, he himself testified during the hearing on the statements that even during the second interview, it was his desire to talk with the investigator whether or not there was an attorney available. Hence, the trial court properly admitted the statements.[1/]

II

Appellant's Prior Possession of Knives

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1. In light of our conclusion, it is unnecessary to address the People's secondary argument that even if these statements were taken in violation of Miranda, they could be used to impeach a defendant who testifies. (Harris v. New York (1971) 401 U.S. 222, 225-226; c.f., People v. Disbrow (1976) 16 Cal.3d 101, 113.)

Appellant contends that evidence he possessed two knives prior to the killing of his mother was irrelevant. He bases this contention of irrelevancy on his assertion that the record shows that he did not possess "a knife at any time near the homicide." The assertion is without merit.

"The trial court is vested with discretion in admitting or rejecting proffered evidence and its decision will not be reversed on appeal unless there is a manifest abuse of that discretion . . . (Cal. Const., art. VI, § 13; Evid. Code, §§ 352, 353, 354.)" (People v. Wein (1977) 69 Cal.App.3d 79, 90.)

The two knives in question each had dagger-type or double-edged blades. The first, a folding knife, was referred to as a "Gerber" knife and the second, a knife in a plastic carrier with straps, was the

"Tekna" knife. It was undisputed that appellant's original Gerber knife had been confiscated by police in September 1983 as an illegally possessed dagger. Appellant's friend, Constantine Potamianos, testified that appellant had given him the Tekna knife prior to Thanksgiving of 1983. The killing of Mrs. McKinney occurred on January 28, 1984. However, appellant's roommate, Christopher Roderick, testified that in early December, shortly after Thanksgiving 1983, appellant came into the dormitory room the two shared and began scratching on the closet door with a Tekna knife. It was on this occasion that appellant etched the words "Death is his" on that door.

Roderick also testified that he overheard a conversation between appellant and Potamianos after appellant's Gerber knife had been confiscated by the police.

In that conversation, appellant referred to that knife as one of his favorites and an expensive one and appeared to be upset about its loss. This testimony also called into question Potamianos' story that appellant had become disinterested in knives after the loss of the knife to police in September.

It is well established that where a specific weapon used to commit a crime is not known, weapons connected to the defendant which could have been used to commit the crime are admissible as circumstantial evidence that defendant was the perpetrator. (People v. Riser (1956) 47 Cal.2d 566, 577; see also, People v. Tahl (1967) 65 Cal.2d 719, 741; People v. De La Plane (1979) 88 Cal.App.3d 223, 239-240; People v. DeVaney (1973) 33 Cal.App.3d 630, 635; People v. Rinegold (1970) 13 Cal.App.3d 711, 720-721.)

The circumstances of the instant case present obvious relevancy. The deputy medical examiner who performed the autopsy on the body of the victim testified that both the Gerber knife and the Tekna knife, as double-edged knives, were capable of producing the wounds on the body.

The Gerber knife presented at trial was the one confiscated in September 1983 by police and as such was unavailable to appellant to commit the murder. The testimony of Potamianos, if accepted at face value, indicated that the original Tekna knife was unavailable to appellant at the time of the killing. However, testimony of the roommate, Christopher Roderick, showed that either appellant had acquired a second Tekna knife or Potamianos' testimony was false or inaccurate. Moreover, the People had to

refute the inference that a Buck knife belonging to appellant's father was the only knife in the house available for the killing.

Lastly, appellant's bloody camouflage pants which were linked by blood-type to the victim's death, had additional significance. Appellant had worn these pants in conjunction with the Tekna knife, and on two occasions -- once while attending the movie "Apocalypse Now" and the other during a nightime power outage at his college -- he had strapped the Tekna knife either to his arm or leg before going out.[2/]

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2. The likelihood is that the Tekna knife, presented by Potamianos to the prosecution long after appellant had been arrested, was not in fact the Tekna knife appellant had previously possessed since it did not have straps on the plastic carrier as had the knife previously described by witnesses. Thus, one view of this evidence was that it indicated that Potamianos, in conspiracy with

Hence, we conclude that not only is appellant's assertion that he did not possess "a knife at any time near the homicide" an incorrect assessment of the facts, but under the circumstances of the case, the probative value of the evidence far outweighs any prejudicial effect.

III

Appellant further contends that he

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appellant, had proffered both the Tekna knife and a pair of black ski gloves to counter prosecution evidence (1) that the bloody ski gloves found in the kitchen were appellant's and (2) that appellant's Tekna knife had disappeared right after the murder. For this reason, the prosecution presented to the jury a second Tekna knife complete with plastic carrier and straps which witnesses identified as more fully resembling appellant's Tekna knife. Appellant does not raise the point, but we note that "[w]here the actual weapon is not found, it is quite proper to introduce a replica or similar weapon to the jury as an example of the type of weaponry that might have been used in a crime. (See People v. Wiley (1976) 18 Cal.3d 162, 176; People v. De La Plane, [supra], 88 Cal.App.3d 223, 239.)" (People v. Frausto (1982) 135 Cal.App.3d 129, 143.)

was prejudiced by the trial court's admission of evidence concerning his obsession and use of knives and commando garb, by the admission of his roommate's testimony concerning his behavior with knives and by the admission of a letter to a girlfriend. He asserts that such matters constituted evidence of bad character when he himself had not put his good character into evidence and that they were in any event irrelevant. Appellant's contentions are not well taken.

"Evidence is admissible in a criminal case if it tends logically, naturally, and by reasonable inference to establish any fact material for the People or overcomes any material matters sought to be proved by the defense. (People v. Poland (1963) 219 Cal.App.2d 422, 427; Evid. Code § 210.) The preference is to admit any evidence which may illuminate

the transaction or give any weight in determining the issue; the strength or weight of the evidence is determined by the jury." (People v. Demond (1976) 59 Cal.App.3d 574, 588-589.)

"[B]ecause a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence (People v. Sykes [1955] 44 Cal.2d 166; People v. Gonzales [948] 87 Cal.App.2d 867)." (People v. Lopez (1969) 1 Cal.App.3d 78, 85; see also People v. Dominquez (1981) 121 Cal.App.3d 481, 498-499.) Likewise, evidence showing quarrels, antagonism, animosity, or enmity between the accused and the victim of a violent offense is proof of motive to commit such offense. (People v. Benton (1979) 100 Cal.App.3d 92, 98; People v.

Daniels (1971) 16 Cal.App.3d 36, 46; People v. Lopez, supra, 1 Cal.App.3d 78, 85.)

As set forth in the preceding discussion concerning the admissibility of evidence of appellant's knives, appellant's possession of such knives was without doubt relevant to show his opportunity to commit the killing of his mother and to refute any implication that his father had used his Buck knife to kill the victim. The testimony of appellant's roommate, Christopher Roderick, was admissible to demonstrate that appellant had not divested himself of his knives prior to Thanksgiving 1983 as appellant's friend, Potamianos, testified. As noted previously, appellant associated camouflage pants with wearing a knife. The bloody camouflage pants found in the house connected the wearer of those pants

with the murder. Thus, the connection of appellant's previous possession of the Tekna knife with the camouflage pants was highly relevant.

Appellant's scratching of the phrase "Death is his" on the closet door in his dormitory room is in some respects obscure. It perhaps tends to indicate that appellant's fascination with knives bordered on morbid associations. However, the phrase was more especially relevant on another score. Quite arguably, the peculiar nature of the phrase caused the date and location of appellant's scratching on the closet door to be etched in Roderick's mind, thus proving that appellant was in possession of the probable murder weapon after Thanksgiving of 1983.

Evidence from appellant's roommate and other acquaintances concerning his

display and comments concerning his "collection" of knives was also highly relevant to refute the testimony of Potamianos that after appellant had had the Gerber knife confiscated, he had lost interest in knives and thus had made a gift of his Tekna knife to Potamianos. This relevant evidence gave rise to the clear inference that appellant either had not given Potamianos the knife or had acquired another one similar to it as well as possibly reacquiring a Gerber knife.

Appellant contests on the same grounds of irrelevancy a letter which he wrote to Pam Kouba. That letter amply displays appellant's animosity toward as well as estrangement from his parents. Thus, in conjunction with the fact that appellant's mother had, on the night of her murder, refused to underwrite a student loan, the letter portrays

appellant's motive for his mother's murder. In the letter, appellant describes his home as "a prison" and relates that he "felt neglected, unloved, [and] even abused." He explains that these feelings stemmed from his belief that his parents "were disappointed in me." He states that "my parents were domineering and possessive beyond belief." He also ominously closed the letter with the statement that "I cannot emphasize how much I am going to need my good friends." In other conversations with his acquaintances he described similar feelings and indicated that he was bitter about the fact that he was an adopted child. The evidence did provide a motive for appellant and showed his incentive to kill his mother. Its probative value exceeded any prejudicial effect and the trial court did not err in admitting the

evidence. (People v. Lopez, supra, 1 Cal.App.3d 78, 85.)

DISPOSTION

The judgment is affirmed.

NOT TO BE PUBLISHED

BOREN, J.*

We concur:

HANSON (L. Thaxton), Acting P.J.

LUCAS, J.

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* Assigned by the Chairperson of the Judicial Council.

DECLARATION OF SERVICE BY MAIL

I, JOSEPHINE D. ROSE, declare that I am over 18 years of age, and not a party to the within cause; my business address is 3580 Wilshire Boulevard, Los Angeles, California 90010; I served a copy of the attached **PETITION FOR WRIT OF CERTIORARI** on each of the following by placing same in an envelope addressed as follows:

Three copies to:
Charles D. Weisselberg, Esq.
Post-Conviction Justice Project
University of Southern California
University Park, **LAW CENTER**
Los Angeles, CA 90089-007

One Copy to:
United States Court of Appeals
450 Golden Gate
San Francisco, CA 94101

United States District Court
312 N. Spring Street
Los Angeles, CA 90012

Each said envelope was then, on JAN 29 1991 sealed and deposited in the United States Mail at Los Angeles, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JAN 29 1991 at Los Angeles, California

RSH:rm

DECLARANT JOSEPHINE D. ROSE